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In the Supreme Court of the United States

October Term, 1972

72-1143

No. [illegible]

ROBERT SPENCER, D.B.A. SPENCER TOOL CO.,
Petitioner,
vs.
STERLING INDUSTRIES, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

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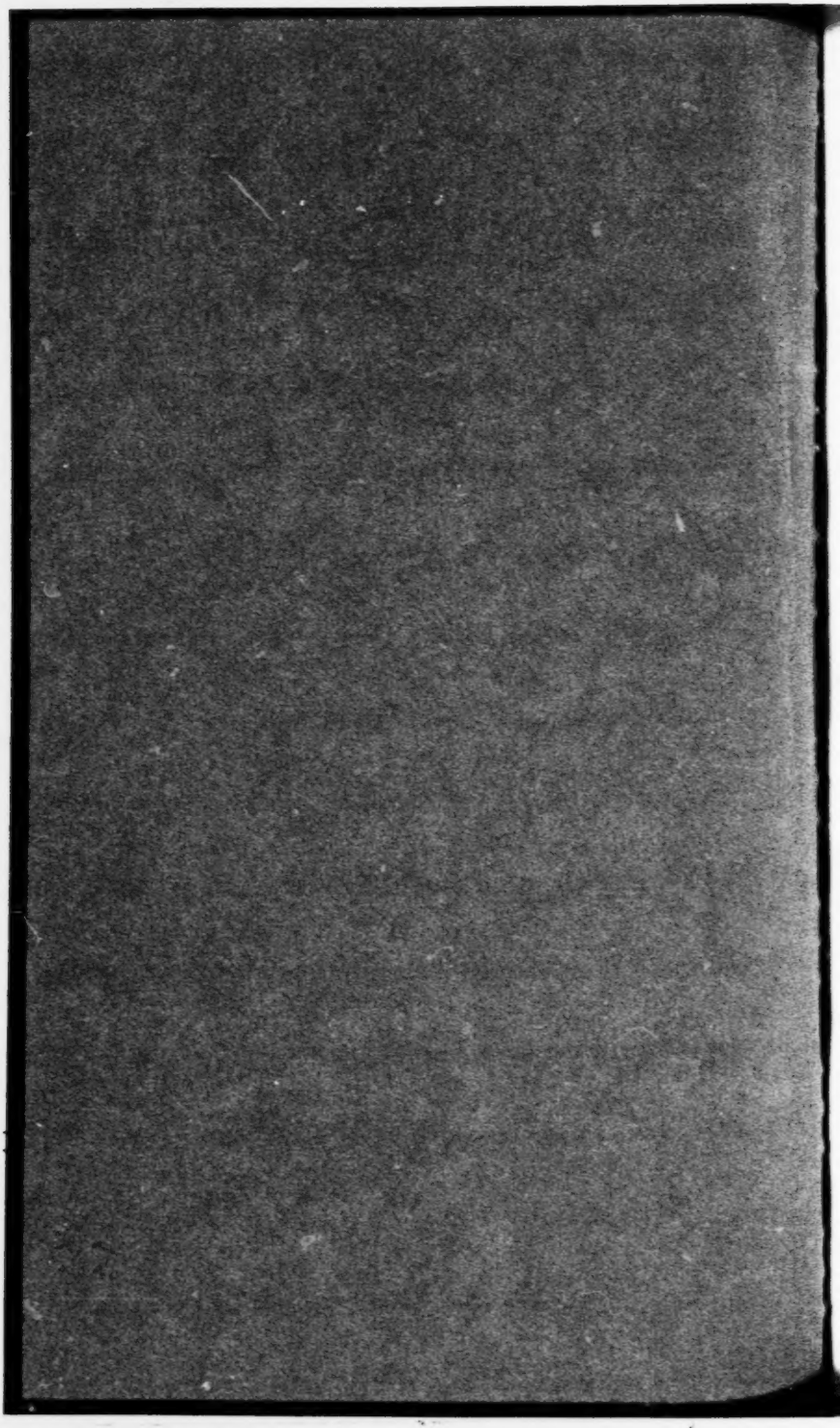

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In the Supreme Court of the United States

October Term, 1972

No. A-673

ROBERT SPERCEL, D.B.A. SPERCEL TOOL CO.,
Petitioner,

vs.

STERLING INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

The petitioner, Robert Spercel, d.b.a. Spercel Tool Co., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio.

OPINIONS BELOW

The opinions of the Court of Common Pleas, the Court of Appeals Eighth District, and the Supreme Court of Ohio, appear in the Appendix as Exhibits A, B, C and D.

JURISDICTION

A Motion for Rehearing was denied on September 22, 1972 by the Supreme Court of Ohio, which rendered its decision in said matter on July 5, 1972.

Justice Potter Stewart granted an extension until February 20, 1973 to file Petition for Writ of Certiorari. This Court's jurisdiction is invoked under Title 28, Section 1257.

QUESTIONS PRESENTED

1. Whether the Supreme Court of Ohio usurped the right of the trier of the facts to make a factual determination—that there was no agreement; and whether the Ohio Supreme Court by upholding the entry of November 9, 1965, has permitted the first trial judge to render a void decision which in effect terminates the valid 20-year royalty contract, without due process of law?

2. Whether the Supreme Court of Ohio has misapplied the Rule as pronounced in the *Cummins Diesel* and *Mainline Theatre* cases and thereby usurped the trial court of its functions?

3. Whether the Supreme Court of Ohio has a right to substitute its decision for the decision of the trier of the facts?

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CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, U. S. Constitution:

No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

Fourteenth Amendment, U. S. Constitution:

Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

CONSTITUTIONAL QUESTION RE: RULE 23

The Constitutional question of the act of the Supreme Court was first raised at the Motion for Re-hearing before the Ohio Supreme Court because the void entry of November 9, 1965 was continuously attacked by the filing of the petition to vacate. The Court of Common Pleas and the Court of Appeals of Cuyahoga County struck the void entry down because there was no prior entry to correct. When the Ohio Supreme Court sustained the entry and denied a re-hearing, it created a power in the Court to issue a void entry in derogation of the individual's Constitutional rights.

STATEMENT OF THE CASE

April 1, 1960—Plaintiff sued for an accounting of a twenty-year contract to pay royalties in exchange for an assignment for a patent for a door closer. Defendant, Sterling Industries, Inc., counter-sued for damages for failure to re-deliver repaired dies.

October 31, 1963—Case called; trial conference had; predicated upon oral representations made during conference and upon data collected from Cole National records (an acknowledged party to the lawsuit, but not a party of record), as of June 30, 1962, the parties entered into an alleged oral $6,000.00 settlement. No written record; no Judge's notes; no steno notes; and no written memorials were ever set forth on the jacket of the case, in the clerk's notes, or on the trial docket.

November 1 or 2, 1963—Defendant prepared Release and presented it to plaintiff's counsel. Release differed from alleged oral settlement when plaintiff was asked to release Independent Lock Company, a Massachusetts corporation (an unknown third party and not a party of record), who had not been previously disclosed.

April, 1964—Plaintiff's subsequent investigation revealed that Independent Lock Company, undisclosed third party, a Massachusetts corporation, was manufacturing door closers conforming to plaintiff's patent.

April 16, 1964—Plaintiff demanded a trial on the merits; Judge re-assigned case to trial list.

August 24, 1965—Case appeared on the active list.

September 4, 1965—Case appeared on the engaged counsel list.

October 2, 1965—Sixteen months after the case was reassigned to the trial list (April 16, 1964), defendant filed motion for Nunc Pro Tunc Entry in re: alleged settlement of October 31, 1963, setting forth its reason that if ordered to trial, the defendant would be "seriously prejudiced by reason of the destruction of said records . . ." (R. 12). Plaintiff did not oppose motion.

November 9, 1965—Judge granted motion without ordering a hearing.

March 23, 1967—Petition to Vacate Nunc Pro Tunc Entry filed by plaintiff, alleging (a) no contract of settlement; (b) fraud and misrepresentation in the inducement of the alleged settlement agreement; and (c) a denial of his day in Court. Defendant answered with a general denial.

November 13, 1969—During trial, plaintiff moved to amend the petition to conform to the evidence in respect to vacating the Nunc Pro Tunc Entry because of fraud and because of irregularities committed by the Court in accordance with Ohio Revised Code 2325.01 C and D.

November 13, 1969—Trial Court vacates Nunc Pro Tunc Entry.

April 1, 1971—Court of Appeals affirms the judgment of the Common Pleas Court.

April 5, 1972—Supreme Court of Ohio reverses the judgment of the Court of Appeals and the trial judge.

September 22, 1972—Supreme Court of Ohio denies the plaintiff's Motion for Re-Hearing.

REASONS FOR GRANTING THE WRIT

I. Whether the Ohio Supreme Court usurped the right of the trier of the facts to make a factual determination—THAT THERE WAS NO AGREEMENT; and whether the Ohio Supreme Court by upholding the entry of November 9, 1965, has permitted the first trial judge to render a void decision which in effect terminates the valid 20-year royalty contract, without due process of law.

A review of the Court records of this case on which the trial court attempts to relate its entry of November 9, 1965, back to October 31, 1963—(the date of the alleged settlement)—discloses that there was in fact, prior to November 9, 1965, *no record*; no memorandum of the alleged settlement or *its terms*; and no writing or notations on the court docket or the case file, made either by the Judge or by his clerk. There was not even a personal record kept by the Judge that he had held a hearing.

The Ohio Supreme Court erroneously rendered its decision based upon the review of the record of *November 13, 1967*, which was generated by plaintiff's petition to vacate the Nunc Pro Tunc Entry of settlement and dismissal of November 9, 1965, which the Court attempted to relate back to October 31, 1963, without reviewing the Court record for the alleged settlement proceeding held on October 31, 1963.

The Ohio Supreme Court in reversing Judge Mitchell's holding of November 13, 1967, usurped his right as the trier of the facts to decide the issue of fact, to-wit:

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That there was no agreement in fact.

It is imperative to recognize that testimony of the witnesses did not in any manner define the terms of settlement, even as to what rights the plaintiff was to surrender in exchange for $6,000.00.

Cross Examination of Judge Hugh A. Corrigan:

> "Q. Now, going back to the day of the settlement, do you recall the specific terms of the settlement?
>
> A. No, I don't recall the specific terms. I recall the dollar amount. But I don't recall the actual specific terms. All I do recall is there was an agreement." (R. 70-B. E. 92-93)

The contract upon which suit was based was executory and was to run to February 26, 1978. The suit was brought on an accounting from February 26, 1958, to April 1, 1960. A critical term of the alleged settlement, *apparently never agreed upon*, was whether the contract was to continue in full force and effect after April 1, 1960, or whether the plaintiff was giving up his future rights to royalties? The defendant's Exhibit "A" discloses that through 1962, the net sales of door closers by Cole National and Sterling Industries amounted to $1,487,641.17, upon which plaintiff could claim a 1% royalty of $14,876.00. Was the settlement therefore a compromise by accepting the lesser sum of $6,000.00 instead of pressing for the larger amount "to date", without the surrender of his right to future royalties? The omission of such term is so substantial and material as to negate the fact of agreement.

In rendering his oral decision, Judge Mitchell succinctly said:

"Now, when we get down to the very basics in this situation, we have a situation where as in many cases the parties agreed and tried to settle the case and thought they had a settlement.

"But there wasn't any agreement. There was no agreed entry. There was no release. There was no money paid.

"And the basic result of the thing, stripped of everything, . . . is to force settlement when in fact it is known at that particular moment by everybody that there is no settlement. " (R. 140-141, B. E. 199-202) (Emphasis added)

The Nunc Pro Tunc Entry of settlement and dismissal, dated November 9, 1965, is a void entry. On November 9, 1965, the *Trial Court* abused its discretion in making such entry, to-wit:

(a) In failing to notify all parties of the date and time of the hearing of the Motion for an Order of Nunc Pro Tunc, and

(b) In signing the Entry of Nunc Pro Tunc without a hearing, amending a court record of October 31, 1963, when the Honorable Court knew, in fact, that there was no court record of the hearing.

In his written decision re: the Spercel case, Judge Mitchell found:

". . . that the alleged *nunc pro tunc* entry was improperly designated as such there being no former judgment of the Court to amend. Also the Court finds that there was no official notice or hearing on the journal entry finding that the case had been settled and dismissing the same. The Court further finds that in fact the case had not been settled."

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> ". . . *The Court feels that the entry reciting a non-existing settlement was placed on the record through inadvertence and mistake and the Court has inherent power to correct this miscarriage of justice and to set aside the entry and order the case tried upon the merits.*" (Italics supplied)

In *Gagnon v. United States,* see 193 U.S. 451, which holds in its syllabus the following:

> "An order, entered nunc pro tunc thirty-three years after an unrecorded judgment naturalizing an alien is alleged to have been rendered, may be attacked collaterally on the ground that the court had no jurisdiction to enter such an order, when no entry or memorandum appears in the record or files at the time alleged for the original entry of the judgment."

Therefore, the court record in this case is void of either an entry of "settled and dismissed", or any other entry, or any memorial, and, precludes the Court from making a Nunc Pro Tunc Entry of "settled and dismissed" on November 9, 1965 to be effective October 31, 1963.

It is true that the plaintiff had notice of the *filing* of the Motion for a Nunc Pro Tunc order, but the Court failed to set the Motion down for hearing and failed to give notice of the hearing. The failure of plaintiff's counsel to take an affirmative action, *other than to orally inform the Judge that there was no agreement,* should not and could not be a greater failure than the failure of the Court to give plaintiff notice that it was going to entertain defendant's Motion at a particular time and date.

The Court's failure to hold a hearing had the total effect of denying plaintiff his constitutional right to oppose the motion ultimately resulting in a denial of due process.

This Honorable Court should speak to this issue *not* merely to correct the errors made, but also as a warning to the States, that through their Judiciaries, they cannot maximize an individual's omission to attack an error, of which the Court has knowledge, as an excuse to minimize the Court's own obligation to follow its own rules and procedures to the end that they do not fail to do substantial justice in their application.

II. Whether the Supreme Court of Ohio has misapplied the rules as pronounced in the federal decisions and thereby usurped the trial court of its functions?

The distinguishing features of the facts of the instant case from *Cummins Diesel Michigan, Inc. v. The Falcon* (1962), 305 F.2d 721-723, and *Main Line Theatres v. Paramount Film Distributing Corp.* (1962), 298 F.2d 801, are, to-wit:

(1) In the instant case there was no prior record of the hearing on the settlement or the terms of settlement, whereas in the cited cases the Honorable Courts were able to review a record to support the entry of settlement and the terms thereof.

> "The findings incorporated in the decrees are supported by the record and the authorities justify the action of the Court." (*Cummins Diesel Michigan, Inc. v. The Falcon*)

(2) In the instant case, when a dispute arose over the terms of the release, which was in reality the terms of settlement, no action was taken by any one for twenty-three months, whereas in the *Cummins Diesel* and *Main Line Theatre* cases, the Honorable Courts acted summarily upon the filing on the Motion to Dismiss.

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(3) In the instant case the plaintiff and his counsel were the only real parties in interest at the settlement hearing of October 31, 1963.

All the alleged party defendants are phantoms, to-wit:

(a) Defendant Sterling Industries had been dissolved as of September 20, 1962. (R. 95) In his opening statement, Mr. Armond D. Arnson, attorney for defendant, said:

". . . Mr. Gerth at that time was no longer affiliated with Sterling; it was a defunct corporation and was not affiliated with Cole National Corporation, because he had nothing to do with the company." (R. 25-B. E. 19)

(b) Cole National was not a party to the case. No officer was present; only an attorney from the law firm who represented Cole National.

(c) Independent Lock Company of Massachusetts, the alleged third party, was not a party to the lawsuit, was not represented by either an officer, counsel or a director or any other person purporting to be acting in their behalf. Their only connection to the case was that they were in a state of merger negotiations with Cole National on October 31, 1963. On November 18, 1963, *18 days after* the alleged settlement of October 31, 1963, Cole National entered into a contract to *acquire* Independent Lock Company. This fact was not announced until February 14, 1964, when Mr. Joseph E. Cole, President of Cole National, in a letter to shareholders announced the acquisition of Independent Lock Company. (Supplemental Record, Plaintiff's Exhibit 11A)

Thus, it is readily seen that the record of this case is in direct conflict with the Supreme Court's holding that all parties concurred in the settlement agreement.

The main rationale of the Supreme Court of Ohio's ruling was that:

> "The law favors resolution of controversies and uncertainty through compromise and settlement rather than through litigation. . ."

And we find no fault with this premise; however, we find fault with the application of this rule when a person is deprived of the benefits of a twenty-year royalty contract because the Supreme Court of Ohio usurped the trial court's function and determined that there was a settlement, when in reality the trier of the facts determined that there was fraud and misrepresentation in the procurement of the settlement. This Honorable Court should address itself to this issue, that a state, acting through its judiciary, shall not deprive a person of his property rights without due process of law.

The constitutional rights of a person are sacrificed when the prime consideration of the court is to reduce the docket without dispensing substantial justice. The holding of the Supreme Court of Ohio in this case is the prime example.

III. Whether the Supreme Court of Ohio has a right to substitute its decision for the decision of the trier of the facts?

The issue as presented by the plaintiff's petition to vacate the Nunc Pro Tunc Entry and by the defendant's general denial was as follows, to-wit:

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Whether the defendant during the alleged settlement negotiations made any misrepresentation of material facts concerning the number of patents being used, the status of production, and the number of parties to the release.

The defendant, Sterling Industries, failed to plead an affirmative defense—namely "a settlement agreement." The defendant's answer in the form of a general denial only raised the issue of whether or not a settlement agreement or release was executed. The facts and evidence of this case established that no settlement agreement and no release were ever signed.

The trier of the facts and the Supreme Court of Ohio both recognized the rule of law, to-wit:

> "Mistake or fraud is ground for rescission of agreements of compromise and release of any character. . ." (*Graham v. Atchison, T. & S. F. Ry. Co.*, 176 F.2d 819)

In his written decision, Judge Mitchell says, to-wit:

> "The Court further finds, however, that even if a petition to vacate be the proper remedy in this case, that the plaintiff has shown sufficient grounds to indicate that the plaintiff was not apprised of all the facts and circumstances surrounding the settlement and that the plaintiff was submitted a release containing the name of a third company not a party to the lawsuit and whom he had not agreed to release and that therefore there was no real meeting of the minds in reaching a settlement of this case."

In a letter dated April 16, 1964, from Loyal V. Buescher (attorney for plaintiff) to Armond D. Arnson (attorney for defendant), Mr. Buescher says:

". . . you sent a journal entry of dismissal on November 1, 1963, but I never returned it to you because my client would not agree to the settlement.

". . . I went to the court room of Judge Corrigan and told him about the situation. He sent the case back to the assignment room. . ." (Plaintiff's Exhibit 8, R. 150.)

The Court's act of placing the matter on the trial list in April, 1964, indicates that all the parties knew that there was no settlement.

No further court action was taken for twenty-three months until the case moved from the trial list to the engaged counsel list. Then the defendant filed a Motion for Nunc Pro Tunc alleging the lame excuse that they destroyed their records in reliance upon the agreement.

The sustaining of the void entry by the Ohio Supreme Court has thrown open the floodgates to the end that orderly procedure and process of administration of justice through its Courts undermines public confidence in the integrity of the Courts and the legal profession.

This case represents one individual against an industrial complex, and said individual finds it necessary to apply to the Supreme Court of the United States to guarantee his day in Court.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of The Supreme Court of the State of Ohio.

Respectfully submited,

LINCOLN R. THORMAN
Counsel for Petitioner

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APPENDIX A

Journal Entry of the Court of Common Pleas

(November 13, 1969)

No. 736,381

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, CUYAHOGA, SS.

ROBERT SPERCEL, d.b.a. SPERCEL TOOL CO.,
Plaintiff,

vs.

STERLING INDUSTRIES, INC.,
Defendant.

JOURNAL ENTRY

This cause came on to be heard upon the petition of the plaintiff to vacate a prior journal entry of the Court filed on November 2, 1965, reciting that the case had been settled and dismissed. The Court, upon hearing the evidence and being duly advised in the premises finds that the alleged *nunc pro tunc* entry was improperly designated as such there being no former judgment of the Court to amend. Also the Court finds that there was no official notice or hearing on the journal entry finding that the case had been settled and dismissing the same. The Court further finds that in fact the case had not been settled.

The Court further finds that it is unnecessary to comply with the statutory provisions relating to the vacation of judgments and grounds thereof, the prior order of dismissal of November 2, 1965, not constituting a judgment within the purview of said section. The Court feels that the entry reciting a non-existent settlement was placed on the record through inadvertence and mistake and the Court has inherent power to correct this miscarriage of justice and to set aside the entry and order the case tried upon the merits.

The Court further finds, however, that even if a petition to vacate be the proper remedy in this case that the plaintiff has shown sufficient grounds to indicate that the plaintiff was not apprised of all the facts and circumstances surrounding the settlement and that the plaintiff was submitted a release containing the name of a third party company not a party to the lawsuit and whom he had not agreed to release and that therefore there was no real meeting of the minds in reaching a settlement of this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that said journal entry dated November 2, 1965, purportedly settling and dismissing the case be set aside and the case remanded for trial upon the merits.

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APPENDIX B

Journal Entry of the Court of Appeals

(April 1, 1971)

Case No. 30117

IN THE COURT OF APPEALS

FOR THE EIGHTH DISTRICT OF OHIO

ROBERT SPERCEL, d.b.a. Spercel Tool Co.,
Appellee,

vs.

STERLING INDUSTRIES, INC.,
Appellant,

and

KATHERINE FECHTER, *et al.*,
Appellees.

Date: April 1, 1971

This cause came on to be heard on the appeal on question of law from the judgment of the Common Pleas Court and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed.

IT IS ORDERED that appellee recover of appellant his costs herein taxed.

The Court finds there was reasonable grounds for this appeal.

IT IS ORDERED that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

APPENDIX C

Opinion and Judgment of the Supreme Court of Ohio

(July 5, 1972)

No. 71-381

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

ROBERT SPERCEL, dba SPERCO TOOL CO.,
Appellee,

vs.

STERLING INDUSTRIES, INC.,
Appellant, et al.,

Contracts—Settlement agreement—Binding on parties to action for accounting, when—Journal entry reflecting settlement may be entered, when—Rescission—Motion to set agreement aside—Necessity.

1. Where the parties in an action for an accounting and royalties voluntarily enter into an oral settlement agreement in the presence of the court, such agreement constitutes a binding contract.

2. In order to effect a rescission of a binding settlement agreement entered into in the presence of the court, a party must file a motion to set the agreement aside; and, in the absence of such motion, a trial court may properly sign a journal entry reflecting the settlement agreement.

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APPEAL from the Court of Appeals for Cuyahoga County.

Plaintiff-appellee, Robert Spercel, doing business as Sperco Tool Company, in April 1960 filed an action in the Court of Common Pleas of Cuyahoga County against defendant-appellant, Sterling Industries, Inc., for an accounting and royalties allegedly due plaintiff pursuant to a contract under which plaintiff assigned to defendant its rights in a door closer for storm and screen doors.

On October 31 and November 1, 1963, the parties and counsel, in the presence of the judge in chambers, concluded an oral settlement agreement. The amount decided upon was $6,000, but subsequently plaintiff refused either to accept that amount or sign a release.

In September 1965, defendant's counsel, by letter, notified plaintiff's counsel that he was filing a motion for journal entry *nunc pro tunc*, providing:

> "The within cause is settled and dismissed at defendants' costs. No record. This entry shall be *nunc pro tunc* effective as of October 31, 1963."

The foregoing entry was signed by the trial judge and filed on November 9, 1965.

In March 1967, plaintiff filed a petition to vacate the judgment, alleging therein that:

> "* * * neither the plaintiff nor the attorney for the plaintiff signed the alleged *nunc pro tunc* journal entry and/or the alleged settlement agreement; that no release was ever signed by the plaintiff; that neither a payment nor any consideration was ever made or given to the plaintiff under the alleged release or alleged settlement agreement; that fraud was practiced by these defendants in obtaining the aforesaid

non [*sic*] pro tunc journal entry and that fraud was practiced upon said court by the defendants in the following respects, to wit: The defendants falsely alleged that no patents were ever obtained by the defendants from the U. S. Patent Office on the invention of the door closer when in reality the defendants obtained two patents from the U. S. Patent Office; that no door closers were ever manufactured, when in reality a subsidiary of Cole National Corp., further described as Independent Lock Company, of Fitchburg, Massachusetts, was and is actively engaged in the manufacture and production of patentable door closers; that this plaintiff has never had his day in court; and that a hearing on this matter has been prevented since the defendants offered the lame excuse that they have voluntarily destroyed their records."

The Court of Common Pleas, after hearing, vacated the judgment and the Court of Appeals affirmed.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

O'NEILL, C. J. The question presented is whether the oral settlement agreement entered into by the parties and journalized in the *nunc pro tunc* entry can be set aside pursuant to a petition to vacate filed by plaintiff who refused to comply with the terms of the settlement agreement.

As noted in 15 American Jurisprudence 2d 938, Compromise and Settlement, Section 4: "The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation. * * * The resolution of controversies * * * by means of compromise and settlement * * * results in a saving of time for the parties, the lawyers, and the courts, and it is thus

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advantageous to judicial administration, and in turn, to government as a whole." To this we might add that courts today could not successfully cope with the volume of their dockets in the absence of settlement agreements.

With the foregoing observations in mind, we proceed to the facts in this cause. At the hearing on the petition to vacate, the trial judge in the original action testified that after the original discussions "* * * both in the presence of both clients and both their counsel, we finally came to what I had understood to be a firm agreement between the lawyers and the clients, with the agreement of the clients."

This cause is thus distinguishable from *Morr v. Crouch* (1969), 19 Ohio St. 2d 24, 249 N. E. 2d 780, wherein a Court of Appeals' judgment vacating a settlement entry was affirmed by this court. In that case, not all parties were present at the settlement conference and the attorney for the absent party lacked authority to enter into the settlement agreement.

In vacating the settlement, the trial court stated that

> "* * * there wasn't any agreement. There was no agreed entry. There was no release. There was no money paid.
>
> "* * *
>
> "The court made an error when it put on an entry of settlement and dismissal, because that was not a fact, and that wasn't a journal entry of judgment in the case at all, because there hadn't been any hearing on the merits."

Thus the trial court refused, in effect, to recognize the validity of the journal entry filed on November 9, 1965,

and held for naught the settlement proceedings in which all parties concurred at the settlement conference. That conclusion on the part of the trial court overlooks the effect of the settlement agreement.

Main Line Theatres v. Paramount Film Distrib. Corp. (1962), 298 F. 2d 801 (certiorari denied, 370 U.S. 939), involved a settlement agreement. The court there found the agreement to be binding, stating, in footnote 1, on page 802:

> "There was no formal offer and no formal acceptance. Neither was there a written settlement agreement. But the record warranted a finding that the negotiations reached a point where mutual assent had been expressed orally to settle the litigation for $10,000. We agree with the district court that the law requires no more formality and not greater particularity than appears here for the formation of a binding contract. Cf. *Taylor v. Stanley Co. of America*, 1932, 305 Pa. 546, 158 A. 157; *Schermer v. Wilmart*, 1925, 282 Pa. 55, 127 A. 315; Restatement, Contracts, §§ 19(b), 26."

We concur with the foregoing analysis of the effect of a settlement agreement, and conclude that the agreement reached here between the parties was of binding effect.

In *Herndon v. Herndon* (1971), 227 Ga. 781, 183 S. E. 2d 386, 388, the Supreme Court of Georgia stated:

> "Where the parties to a case pending in court enter into a definite * * * oral settlement agreement, compromising the issues, and there being no denial of this agreement, it is the duty of the court to make the agreement the judgment of the court and thereby terminate the litigation."

Even stronger is the language found in *Cummins Diesel Michigan, Inc., v. The Falcon* (1962), 305 F. 2d 721, 723, where the court stated "* * * that a settlement agreement or stipulation voluntarily entered into cannot be repudiated by either party and will be summarily enforced by the court."

It is apparent here that there was an intention on the part of plaintiff to disavow the settlement agreement for the reasons expressed in the petition to vacate. This intention was made known to the trial judge sometime after April 16, 1964, when plaintiff's counsel told the judge personally that his "* * * client was dissatisfied with the settlement and wouldn't sign the release and that I [counsel] wanted to try the case."

Something more is required of a party to effect a rescission of a settlement agreement than was done in the instant case. When the trial judge signed the *nunc pro tunc* entry, he was merely journalizing what had transpired in the cause at the settlement conference. Although he had knowledge that plaintiff had not complied with the agreement, the judge acted properly in signing the entry in the absence of some affirmative action on the part of plaintiff other than oral notification that plaintiff would and had refused to honor the agreement.

Once the settlement agreement was achieved through the efforts of the trial judge, plaintiff had a duty, if he wished to disavow that agreement, to file a motion to set it aside.

To permit a party to unilaterally repudiate a settlement agreement would render the entire settlement proceedings a nullity, even though, as we have already determined, the agreement is of binding force.

In an action for accounting and royalties a settlement agreement entered into between the parties in the presence of the court constitutes a binding contract, even though not reduced to writing; and where a party enters into such an agreement he must, if he seeks rescission, file a motion to set it aside. Where no such motion is filed, a journal entry reflecting the settlement agreement will be given effect.

In respect to the allegations of fraud contained in the petition to vacate, the record shows that plaintiff's counsel had knowledge that the motion for the *nunc pro tunc* entry was being filed by virtue of a letter dated September 30, 1965, which was sent to him by defendant's counsel and which he admitted receiving. Plaintiff admits that he did not oppose that motion, although an examination of the record reveals that plaintiff had knowledge of the facts, upon which the assertion of fraud is based, prior to the time the motion for the *nunc pro tunc* entry was filed.

Had the entry been filed before the alleged fraud was discovered, then clearly plaintiff could raise it, as plaintiff contends, under R. C. 2325.01. However, where the facts concerning the alleged fraud were known to plaintiff prior to the entry of judgment, which was based on the settlement agreement, they could have been asserted in opposition to the motion for the *nunc pro tunc* entry. Therefore, we are of the opinion that plaintiff's failure to do so estops him from asserting the alleged fraud in a petition to vacate.

For the foregoing reasons, the judgment of the Court of Appeals is reversed and final judgment is rendered for defendant.

Judgment reversed.

SCHNEIDER, HERBERT, STERN and LEACH, JJ., concur. CORRIGAN and BROWN, JJ., dissent.

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APPENDIX D

Order Denying Rehearing

(September 22, 1972)

No. 71-381

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

ROBERT SPERCEL, dba SPERCO TOOL CO.,
Appellee,

vs.

STERLING INDUSTRIES, INC.,
Appellant, et al.,

REHEARING

It is ordered by the Court that rehearing in this case is denied.